

NTSB Order No.  
EM-15

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 14th day of April, 1971.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

NICOLAS GARCIA

Docket ME-15

OPINION AND ORDER

The appellant, Nicolas Garcia, has appealed from the decision of the Commandant, dated June 26, 1970, affirming the revocation of his Merchant Mariner's Document (No. Z-817946-D1) and all other seaman's documents, for misconduct while employed, under the authority of his documents, as a bedroom steward aboard the SS ARGENTINA, a merchant vessel of the United States.<sup>1</sup> The Commandant's action was taken on appellant's appeal (Appeal No. 1796) from the initial decision of Coast Guard Examiner Francis X. J. Coughlin on January 20, 1969, following a full evidentiary hearing.<sup>2</sup> Throughout these proceedings, appellant has been represented by counsel.

The examiner found that on January 13, 1968, while the ARGENTINA was in port at Port Everglades, Florida, appellant committed two acts of assault and battery on a fellow crewmember, Messman Samuel Alston. The first offense involved slapping Alston in the face in the crew galley area. Later, in the passageway leading from the crew messhall, it was found that he stabbed Alston with a knife. It is undisputed that on the date in question, Alston received a serious knife wound in the upper abdomen, requiring two weeks' hospitalization.

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<sup>1</sup>The Commandant's action was taken pursuant to 46 U.S.C. 239(g). The appeal to this Board is authorized under 49 U.S.C. 1654 (b)(2) and is governed by the Board's rule of procedure set forth in 14 CFR Part 425.

<sup>2</sup>Copies of the decisions of the examiner and the Commandant are attached hereto.

The examiner further found that the offense of creating a shipboard disturbance, although established by the evidence, was merged with the second offense of assault with a knife.<sup>3</sup> The examiner considered appellant's prior record<sup>4</sup> and sanctions imposed by the Coast Guard for assault with a dangerous weapon accompanied by injury to another.<sup>5</sup> He thereupon concluded that revocation was the appropriate sanction.<sup>6</sup>

Appellant here relies on his brief filed with the Commandant, wherein he contended that the examiner's decision was contrary to the weight of the evidence. The Commandant held that this contention "is not a sufficient bottom for an appeal"; the appellant's supporting arguments are based on conflicts in the evidence; it is the examiner's function, as trier of the facts, to resolve such conflicts; and the only test for review of the examiner's decision is whether there is substantial evidence to support his findings. The Commandant's opposing brief to the Board asserts that the examiner's decision is supported by the substantial evidence of record.

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<sup>3</sup>In view of the examiner's finding, the merged offense will not receive separate treatment in this appeal.

<sup>4</sup>Appellant's record of prior offenses was stipulated as follows: "Susp. 3 months from 3 June 55 and 9 months on 12 months probation NYK, absent from vessel and duties, cursed and struck Ch Steward, SS SAN JOSE. Warned 17 April 63 NYK create disturbance SS ARGENTINA."

<sup>5</sup>46 CFR Section 137.03-5 provides, in pertinent part, as follows: §137.03-5 Offenses for which revocation of licenses or documents is sought.

(a) The Coast Guard will initiate administrative action seeking revocation of licenses, certificates or documents held by persons who have been involved in acts of such serious nature that permitting such persons to sail under their licenses, certificates and documents would be clearly a threat to the safety of life or property.

(b) These offenses, which are deemed to affect safety of life at sea, the welfare of seamen or the protection of property aboard ship, are:

(1) Assault with dangerous weapon (injury)."

<sup>6</sup>46 CFR Section 137.20-165 gives a table of disciplinary sanctions for various types of seamen's offenses "for the information and guidance of examiners." Assault with a dangerous weapon (injury) is listed as warranting the sanction of revocation on the first offense.

We disagree with the Commandant's rationale. In order to affirm the examiner's factual findings, he must be satisfied that the findings are based on substantial evidence, and that such evidence is both reliable and probative, as required by the Administrative Procedure Act.<sup>7</sup> In addition, both the Act and the Commandant's regulations provide that the burden of proof rests upon the Coast Guard to prove its case before the examiner;<sup>8</sup> that is, by a preponderance of the substantial, reliable, and probative evidence. Notwithstanding the inadequacy of the Commandant's standard of review, we conclude that his decision affirming the examiner should be upheld.

Appellant argues that the reliability of the Coast Guard's witnesses is suspect, because of conflicting testimony adduced from his own witnesses in respect of the slapping offense, and conflicts, discrepancies, and "incongruities" in the testimony of Alston and the one witness who corroborated the stabbing offense. We agree with the Commandant that the examiner's findings based on the credibility of witnesses appearing before him should not be disturbed, absent a clear showing that such determinations are inherently incredible or unreliable, and not supported by the record as a matter of law. We are not here persuaded that appellant makes the requisite showing.

The examiner's resolution of conflicts concerning the slapping offense is of little import. Alston was not put in fear; he promptly retaliated in kind, and the appellant received the worst of it in the fight that ensued. While, in our view, the record adequately supports the examiner's findings that appellant struck the first blow, the offense is regarded as de minimis in the context of this case.

Contrary to appellant's basic contention, moreover, we believe the examiner's finding concerning the stabbing offense is supported by the weight of the evidence. Appellant returned to his own room after the fight, and Alston returned to his duties in the messhall.

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<sup>7</sup>The "substantial evidence" test is the recognized standard for judicial review of agency action under the Act (5 U.S.C. 706). However, at administrative levels of review, the test for adjudicative determinations is whether the sanction imposed, based upon consideration of the whole record or such portions thereof as may be cited by any party, is "supported by and in accordance with the reliable, probative and substantial evidence" (5 U.S.C. 556(d)). See also, 46 CFR sections 137.20-1(a), 137.20-95(b).

<sup>8</sup>5 U.S.C. 556(d); 46 CFR section 137.20-77.

Appellant testified that he washed his face and then, admittedly motivated by revenge, returned to the messhall, tapped Alston on the shoulder and invited him outside in the passageway to renew their fight. Eveline Dayes, a ship's waitress, testified that she saw a knife protruding from appellant's hip pocket as he headed for the passageway, with Alston "right-behind" (Tr. pp. 87, 90, 92). Alston testified that appellant immediately punched him in the jaw with his right fist as he stepped outside, and he caught sight of a knife "like in a flash second" (Tr. p. 54.) in appellant's left hand, coming toward him. According to his testimony, he dodged the first thrust, but thereafter received cuts on his hands and in the stomach, which he demonstrated to the examiner.

He added that the chief cook intervened to stop the fight, at which point he went to his room, only then realizing he was seriously wounded. An injury report of the ship's doctor and nurse, admitted into evidence without objection, stated that they found Alston lying in a pool of blood and that he had been stabbed. The time noted was 20 minutes after the time appellant testified he went to the galley prior to his first fight with Alston.

In the ship's log of the second incident, appellant's reply is recorded as follows: "I only tried to defend myself. I had nothing to do with the knifing." At the hearing, however, his case was not built around the theory of self defense. Rather, while appellant and two purported eye witnesses testified that it was Alston who carried a knife out to the passageway, they each also maintained appellant did not wrest the knife from Alston at any time and that Alston had not been stabbed at all in the fight. Although appellant's arguments cast a certain element of doubt on the Coast Guard's case, proof that the stabbing of Alston occurred in the passageway during the fight outweighs the probity of appellant's case. He and his witnesses would have it that Alston was stabbed at some later time by an unknown assailant. Under the circumstances and time frame of events in this case, the examiner was entitled to regard the appellant's case with incredulity.

While appellant attacks the credibility of Alston and Dayes as witnesses on numerous grounds, we find record support for his arguments in only two respects. One instance concerns Alston's testimony that appellant was wearing a red baseball cap. Miss Dayes testified he was not wearing a hat, although readily admitting she could not remember (Tr. p. 85). There was no direct conflict between them. Even so, we are inclined to disbelieve Alston, who claimed that the baseball cap prevented him from recognizing appellant until they had reached the passageway. Since Alston had an altercation with appellant moments before, this is hardly credible. The examiner should have considered the impeaching effect of this gap in Alston's credibility; however,

this would have represented a mere subsidiary finding. Based on the record, there is no necessity of relating this lame effort on Alston's part to exonerate himself from blame for knowingly engaging in the second fight, with his testimony concerning the fight and its consequences to him, which was clear and straightforward.

In the second instance, appellant argues the incongruity of Alston following him into the passageway, as Miss Dayes testified, with a knife handle sticking out of his back pocket. Alston admitted having a handful of silverware at the time, and appellant asks us to assume that he followed only "because he was the one who carried the chrome steak knife." While again we agree that the examiner should have evaluated the contested evidence, we have no basis for reversing his credibility findings. Alston denied taking a knife into the passageway. There are many possible explanations why he followed appellant, carrying the knife. It is entirely possible that he did not see the knife, either because appellant covered it with his hand or because of the immediate convergence of a crowd around them. These and other possible explanations were not explored by appellant's counsel on cross-examination. In this state of the record, it cannot be said that the examiner's findings in relation to Miss Dayes' testimony are inherently incredible.

In other arguments, appellant questions Alston's denials of admittedly hearsay testimony concerning a report that he had previously threatened the third cook with a knife; and Miss Dayes' failure to mention appellant having a knife in her signed statement during the shipboard investigation. Upon review of the record, we find no error in the examiner's failure to assign any weight to contradictory hearsay evidence, nor do we find that Miss Dayes' sworn testimony was impeached by the one-sentence description of the fight she gave aboard ship. So far as it goes, we find that her shipboard statement comports with her hearing testimony and would be no basis for disturbing the examiner's finding as to her credibility. Other asserted conflicts and discrepancies in the testimony of Alston and Dayes are not borne out by our examination of the record, or they are deemed to be inconsequential.

In sum, we conclude that the examiner's findings, as affirmed by the Commandant, are supported by the substantial, reliable, and probative evidence of record, and that such evidence preponderated in favor of the Coast Guard's case. Without reference to appellant's prior record, which is neither good nor bad, we agree that appellant's act of violence in stabbing Alston renders him a clear threat to the safety and welfare of others aboard ship, and warrants the sanction her imposed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it is hereby denied; and

2. The orders of the Commandant and the examiner revoking all of appellant's seaman's documents be and they hereby are affirmed.

REED, Chairman, LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

(SEAL)